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DDA 75-4603

29 September 1975

MEMORANDUM FOR: Deputy Director for Administration

SUBJECT : Comments on OGC's Suggested Revision of the Agency Regulatory Process

Sir:

1. This memorandum provides a précis of the present Agency regulatory system, highlights the good and bad features of the system, critiques the new features introduced by the OGC proposal to revise the system, and presents some alternate suggestions.
2. The steps involved in the present Agency regulatory process are:
  - a. The originating component submits to the Regulations Control Branch, through a designated component coordinating officer, a proposed regulatory issuance. The proposal might be a new regulation, a revision or amendment to an existing regulation, or a handbook or notice on a regulatory matter.
  - b. If the proposed issuance appears to be needed, the Regulations Control Branch edits the proposal for clarity, brevity, and consistency with regulatory language, and forwards it to coordinating points representing major components of the Agency -- the four Deputy Directors, the Office of General Counsel, the Inspector General, the Comptroller, and, on occasion, the O/DCI.
  - c. These offices in turn distribute copies to their subordinate offices for review and comment.
  - d. Comments received from the subordinate offices are consolidated and forwarded to the Regulations Control Branch which either revises the draft to incorporate the comments or makes rebuttals on behalf of the originator indicating why a coordinator's comments are not acceptable.
  - e. The comments, rebuttals and replications continue until all concur in the proposal.

f. The fully coordinated proposal is forwarded to the DDA for authentication of Headquarters issuances or to the DDO for authentication of field issuances.

g. Each directorate may issue additional or supplemental directives providing further detail to the Agency-wide issuance.

3. The good features of the present system are:

- Regulatory issuances are a cooperative effort of all major components.
- Every regulatory proposal benefits from a critical review by the coordinators, each with varying types of Agency experience and points of view, and on whom any given proposal will impact differently.
- The requirement of unanimous concurrence before publication should assure unanimous support for, and compliance with, the published issuance.

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- Provision for supplemental regulatory issuances at the directorate level permits greater specificity on subjects of particular concern to a directorate.

4. The bad features of the present system are:

- There is no ready mechanism to resolve controversies that may arise over the language or substance of a proposal.
- The requirement of unanimity often results in interminable delays in publication over relatively minor issues.
- There is no central mechanism to determine whether supplemental directorate issuances are necessary and to assure that directorate issuances having the force and effect of regulations are consistent with Agency regulations.

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- Directorate coordinating procedures preclude the bringing together of parties from each directorate who have the principal interest in, or the principal difficulty with, the proposal under consideration.
- The extensive coordination required often results in inordinate delay from the time a proposal is made to its final publication and dissemination. This creates a real hardship on personnel who must depend on the Agency regulatory system for proper and timely guidance.
- Regulatory proposals that are clearly of a routine nature or occasioned by changes required by law or administrative action of other Federal departments or agencies are subjected to the same extensive coordination required of all other regulatory material. For example, it is not uncommon to spend several weeks in effecting a minor regulatory change necessitated by a revision in the standardized Government travel or allowance regulations.
- The present system does not permit prompt action to rectify a mistake if an error or omission is discovered after a regulation has been published.
- A coordinator may be as willing or unwilling as he desires to compromise on matters of either substance or trivia. He may exercise his veto authority as he wishes.
- The cooperative committee approach in promulgating a regulation at times deliberately introduces ambiguity as a way to resolve controversy. The committee approach also diffuses responsibility for the end result.

5. One or more of the above flaws in our regulatory process have been subjected to critical study by Agency management for twenty years. The OGC study, highlighting the legal force and effect of our regulations and emphasizing the concept of derivative authority from a positive chain of delegations, is a new approach that would solve some of our problems but, unfortunately, would create others. While I agree with the points made by OGC in the general discussion sections of their study, I offer the following critique of the "Findings, Conclusions and Recommendations" section, several provisions of which create new problems. For ease of reading the OGC proposals are abbreviated:

Proposal: "1. The Director of Central Intelligence should rely on the General Counsel to review all Agency regulatory materials for their legality."

Comment: Agree

Proposal: "2. The General Counsel may delegate the review."

Comment: Agree

Proposal: "3. The forms of the Agency regulatory materials should be reconstituted as follows:

"(a) All regulatory materials should cite the authority from which they are derived. Approving officer named in reg."

Comment: Citing authority from which a regulation is derived would provide a high degree of order and a firm basis for each regulation, and would be of obvious value if the Agency becomes subject to GAO audit. But I doubt that citing authority in every regulation is practicable. The authority for most of our regulatory material would be based on our enabling legislation and the statutes cited therein. Is it useful to repeat this repetitiously in every regulation? (I also question whether this is usual Government practice.) In any event OGC could initiate this practice within the existing procedures by adding the legal authority for the regulation at the time of coordination. If this is adopted I suggest instead, however, that a statement be made in the Headquarters regulations that all Agency regulations are published under the express or implied authority of our enabling legislation unless otherwise noted, and that OGC then assume the responsibility to add during coordination a citation of authority for any regulation not falling within the purview of such legislation. With respect to the addition of the names of approving officers and dates of approval to regulations, I recommend that we do not do so because (1) the regulations would become personalized and might be considered obsolete by the reader on departure of the approving officer, (2) the regulations would become more cluttered with peripheral rather than regulatory material, and (3) the name of the approving officer and date of approval is more appropriately retained in the Regulations Control Branch repository of the legislative history of the issuance.

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Comment: In assuming responsibility for Agency regulations, I had the same thought. In the abstract it makes good sense. The procedures and approval authority for actions taken in the field, however, are totally different from procedures and lines of approvals in Headquarters. To design one document to serve both purposes would require either alternating paragraphs dealing

with Headquarters and field procedures in each regulation or a regulation so general as to be ambiguous and lacking in necessary guidance.

I suggest instead that the two regulatory systems be related to each other by identical paragraph numbering, in addition to the present series numbers designating the major subject categories (Logistics, Security, Personnel), to permit cross-referencing between Headquarters and field regulatory paragraphs.

Proposal: "4. The approval of Agency regulatory materials should be reconstituted."

"(a) The Director must approve all Agency regulatory materials in which he delegates his authority."

Comment: Agree

"(b) The Agency officer or employee to whom the Director has delegated authority, may redelegate when expressly provided for."

Comment: I suggest adoption of the more usual rule permitting redelegation of authority unless specifically prohibited, so that the sentence would read ". . . may redelegate that authority unless expressly prohibited in the Director's original delegation."

"(c) Authorities delegated in Paragraph (b) above may be redelegated when expressly provided for."

Comment: Same as (b) above.

"(d) The Agency officer or employee within whose delegated authority a regulation falls should have the authority to approve such a regulation within the following guidelines:

"(1) The Regulations Control Branch should have the final authority as to form, style and editorial matters.

"(2) The regulatory material can be approved only after the General Counsel finds no legal objection thereto.

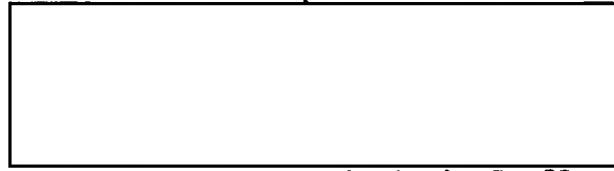
"(3) Any component that is in disagreement with the approving officer or employee must convince the authority from which the approving officer or employee derives his authority that the regulatory material should not be approved.

"(4) Any disagreement as to who is the authorized approving officer will be determined by the General Counsel."

Comment: This proposal is a mixture of good and bad features. The proposals of subparagraph (1) would eliminate some of the delays which occur over trivial matters; subparagraph (2) reflects a current and necessary procedure; subparagraph (3) would be inapplicable if my observations below concerning the level at which regulatory material should be approved are valid and; subparagraph (4) is a useful mechanism to adjudicate disagreements but not those relating to the proper approving officer.

The basic provisions of this paragraph as stated in the introduction to the four subparagraphs, namely that an Agency officer within whose delegated authority a regulation falls should have the authority to approve the regulation, is highly undesirable. This would provide delegation of authority to approve regulations down to the same level as the delegation of authority to accomplish a specific job so that, if I interpret this provision correctly, the procurement officer would, for example, approve procurement regulations. Such a provision would go well beyond what reasonably would be acceptable to Agency management. I suggest instead that the delegation of authority to approve all regulations, field as well as Headquarters, be vested in one officer, who logically would be the DDA.

6. Change in our regulatory process is essential if management is to provide timely guidance to Agency employees. To accomplish this, I suggest that we concur in the discussion section of the OGC study but ask that OGC substitute a proposed regulation for the Findings, Conclusions and Recommendations of their paper and offer the attachment as a draft of such proposed regulation for OGC consideration. This draft has been designed to overcome the flaws perceived in our present system as outlined in paragraph 4 above and would permit, if adopted, timely issuance of coordinated and properly approved regulatory matter.



Chief, Information Systems Analysis Staff

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Attachment: a/s

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